SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

---------- X INDEX NO. 654070/12

PAUL D'EMILIA

Plaintiff,

-- against --

TAG PARTNERS, LLC, JOSEPH TACOPINA, and PAUL M. GALVIN,

Defendants.

---------- X

JOAN A. MADDEN, J.:

In this action seeking to recover repayment of a loan, interest and attorneys' fees in connection with a failed deal to purchase an Italian soccer team, defendants TAG Partners, LLC ("TAG"), Joseph Tacopina ("Tacopina") and Paul M. Galvin ("Galvin") move to dismiss the complaint against them. Plaintiff opposes the motion, which is granted in part and denied in part.

Background[1]

In late 2007, plaintiff was approached by his long-time friend, Tacopina, with the opportunity to participate in a business venture with Galvin and TAG, a Delaware limited liability company managed by Tacopina and Galvin. The business venture involved TAG's purchase of a soccer club located in Bologna, Italy ("Italian Team") from the Italian company, Aktiva.

Plaintiff agreed to participate in the business venture. Over the next few months, plaintiff worked on behalf of the defendants and as a representative of TAG. Plaintiff spoke fluent Italian and frequently traveled to Italy to negotiate with Aktiva, on behalf of TAG. Plaintiff's work was mostly uncompensated. The parties agreed that once the

[1] The following facts are based on the allegations of the first amended complaint which, for the purposes of this motion, must be accepted as true, and the documentary evidence before the court.

purchase of the Italian Team was complete, plaintiff would receive a position with the Italian Team and some equity in the Italian Team. At this time, defendants secured financiers for the deal and plaintiff was not requested to contribute any of his own money.

Aktiva and defendants agreed that by a specified date in June 2008, defendants would place €2,000,000 (Euros) in escrow, as a deposit ("Deposit") towards the purchase price of the Italian Team. The Italian law firm, Tonucci & Partners, represented defendants and was to act as custodian of the Deposit.

The day before the Deposit was due, plaintiff and defendants, Tacopina and Galvin, were in Italy to sign the contract with Aktiva. That night, plaintiff, Tacopina and Galvin went to dinner at a restaurant. Tacopina and Galvin realized they were short of the €2,000,000 required Deposit, due to Aktiva the next day. Defendants begged plaintiff to contribute $100,000 of his own money. In order to prevent the business venture from failing and out of loyalty to his friend, plaintiff agreed to contribute $100,000. The parties did not have time to memorialize their agreement in writing, but agreed that plaintiff's $100,000 contribution towards the Deposit was an "emergency loan" and that defendants would fully repay said loan upon the closing of the Italian Team purchase. On or about the night of June 5, 2008, plaintiff transferred $100,000 from his Merrill Lynch account in the United States to Tonucci & Partners in Italy ("Loan").

Defendants' agreement with Aktiva to purchase the Italian Team was never consummated. A dispute then arose between the defendants and Aktiva over which party was entitled to retain the Deposit held by Tonucci & Partners, which included the euro equivalent of the plaintiff's $100,000 contribution. The dispute went before an

arbitration panel in Italy. In October 2009 the panel issued a final decision, awarding approximately 80% of the Deposit to TAG and the remaining 20% to Aktiva. Defendants transferred their proceeds from the arbitration to various accounts, including those of investors and other parties, unknown to plaintiff. Plaintiff subsequently approached defendants for the repayment of his Loan. Defendants did not repay any portion of plaintiff's Loan. In October 2012, plaintiff's attorney sent letters to Tacopina and Galvin demanding the repayment of plaintiff's Loan. Defendants still did not repay plaintiff for any portion of his Loan.

Plaintiff commenced with this action in November 2013, and subsequently filed a First Amended Complaint on June 5, 2013. The First Amended Complaint contains the following causes of action against each of the defendants: (1) breach of contract; (2) conversion; (3) unjust enrichment; and (4) breach of implied covenant of good faith and fair dealing.

Defendants move to dismiss the amended complaint against them in its entirety, based on documentary evidence including an email exchange, arguing that the $100,000 was an investment in the deal to purchase the Italian Team, and not a loan as contended by plaintiff. Defendants note that unlike a typical loan, in this case no interest rate or terms of the Loan were discussed. Defendants maintain that plaintiff acted as a principal of the deal to purchase the Italian Team, and not as a creditor, and that the condition of repayment was contingent on the closing of the Italian Team purchase agreement, a condition that was never met.

Defendants alternatively argue that, at the very least, the amended complaint should be dismissed against individual defendants Tacopina and Galvin, relying on case

law holding that a member of a limited liability company is not liable for the company's obligations based on the individual's status as a member of the company. Defendants point out that there is no allegation of any written contract between plaintiff and Tacopina and Galvin, and that plaintiff transferred $100,000 from his US account to Tonucci & Partners, an Italian firm that represented only TAG. Defendants also note that the Italian Team purchase agreement, a redacted copy of which is submitted with the motion papers, only names TAG as the purchaser and subsequently the award from the Italian arbitration panel was in favor of only TAG, and not Tacopina and/or Galvin.

As for the conversion claim, defendants argue that it should be dismissed as it is based on the same allegations as the breach of contract claim, fails to identify a specific fund from which payment can be made and fails to trace the loan funds. With respect to the unjust enrichment claim, defendants argue that it should be dismissed, as individual defendants did not receive a direct personal benefit and it is duplicative of the breach of contract claim. Defendants also argue that the claim for breach of the implied covenant of good faith and fair dealing is intrinsically connected to the claim for breach of contract and should therefore be dismissed.

In opposition, plaintiff argues that the allegations in the complaint are sufficient to allege that his $100,000 contribution towards the purchase of the Italian Team was made as a loan to defendants, and not as an investment in the purchase. Plaintiff notes that the complaint alleges that the parties did not have a chance to memorialize their agreement in writing, but nevertheless an oral contract was created and that his contribution was an "emergency loan" that would be fully repaid upon the closing of the Italian Team purchase.

Plaintiff also asserts that Tacopina and Galvin acted in their personal capacities when they "begged" plaintiff to make the loan. Plaintiff argues that he never considered himself a principal in the deal and that the emails relied on by defendants, in which Tacopina identifies him as a principal, are not dispositive. Plaintiff further argues that discovery would assist in identifying the creditors and/or investors who received the proceeds of the arbitration award.

In reply, defendants note that plaintiff does not challenge the law cited in support of the dismissal motion, holding that members of a limited liability company are not liable for the debts of the company. In this connection, defendants note that Tacopina and Galvin did not receive the $100,000 from plaintiff, but rather, the money was transferred into Tonucci & Partners, a law firm that represented only TAG.

DISCUSSION

When considering a dismissal motion based on the pleadings "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law..." Guggenheimer v. Ginzburg, 43 NY2d 268, 275 (1977)(citations omitted). The court must "construe the complaint liberally and accept as true the facts alleged in the compliant and any submissions in opposition to the dismissal motion and accord plaintiffs the benefit of every favorable inference." Richbell Information Services, Inc. v. Jupiter Partners, L.P., 309 AD2d 288, 289 (1st Dept 2003), citing, 511 West 232nd Owners Corp. v. Jenifer Realty Corp., 98 NY2d 144, 152 (2002). A motion to dismiss pursuant to CPLR 3211(a)(1), "a dismissal is warranted only if the documentary evidence submitted, conclusively establishes a defense to the asserted claims as a matter of law."

Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). "To be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity." Fontanetta v. Doe, 73 A.D.3d 78, 86 (2nd Dept 2010), *citing*, Siegel's Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, at 21-22, CPLR 3211(a)(1), C3211:10; see also Tsimerman v. Janoff, 40 A.D.3d 242 (1st Dept 2007). Thus, affidavits, emails and letters are not considered documentary evidence. Fontanetta v. Doe, 73 A.D.3d at 86.

The first cause of action, for breach of contract, is based on allegations that defendants failed to repay plaintiff for any portion of the "emergency loan" of $100,000, which was used towards the Deposit for the Italian Team purchase agreement. Specifically, it is alleged that in exchange for plaintiff's agreement to provide the loan through an electronic transfer of $100,000 to defendants' escrow custodian in Italy, defendants agreed to repay plaintiff for such contribution upon the closing of the purchase agreement. It is further alleged that while plaintiff performed his obligation by providing the funds, defendants did not return the money to plaintiff, even though the Italian arbitration panel awarded most of the Deposit to defendants, including the proceeds of the Loan.

To state a cause of action for breach of contract the pleading must specify "the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant." Furia v. Furia, 116 AD2d 694, 695 (2d Dept 1986).

Here, the documentary evidence submitted in support of defendants' motion does not conclusively refute the allegations in the amended complaint that defendants and plaintiff had an oral loan agreement. Moreover, while, a member of a limited liability

company cannot be held liable for the company's obligations based solely on his status as a member (Retropolis, Inc. v. 14th St. Dev. LLC, 17 A.D.3d 209, 210 (1st Dept 2005), here it is alleged that the individual defendants agreed to repay the Loan. In addition, although the documentary evidence shows that the Deposit was used by TAG, and not the individual defendants, to purchase of the Italian Team, this fact does not refute the allegations that the individual defendants agreed to repay the loan.

That being said, however, the breach of contract claim is insufficient to state a cause of action. The complaint alleges that under the terms of the oral agreement, plaintiff was to be repaid upon the closing of the purchase of the Italian Team, but does not allege that this condition to plaintiff's payment occurred. Instead, it is alleged that the deal to purchase the Italian Team was never consummated. As a condition precedent to plaintiff's payment was not met, the breach of contract claim must be dismissed. See e.g.,John J. Kassner & Co., Inc. v. City of New York, 46 N.Y.2d 544 (1979) (noting that obligation to pay under a contract does not arise until condition is fulfilled); HGCD Retail Servs., LLC v. 44-45 Broadway Realty Co., 37 A.D.3d 43 (1st Dept 2006) (plaintiff not entitled to commission where condition precedent to his payment not met).

The second cause of action relates to defendants' alleged conversion of plaintiff's $100,000 contribution towards the Deposit. To properly plead a cause of action for conversion, it is incumbent upon plaintiff to allege facts establishing that he owned or had a superior right to the property in question, that plaintiff demanded its return, and that defendant refused to deliver it. See Weider v. Chemical Bank, 202 A.D.2d 168 (1st Dept), lv denied 83 N.Y.2d 759 (1994). Moreover, when the property allegedly converted is money, it must be specifically identifiable and segregated, and be subject to

an obligation to be returned or to be treated in a particular manner. Manufacturers Hanover Trust Co. v. Chemical Bank, 160 A.D.2d 113, 124 (1st Dept 1990), lv denied 77 N.Y.2d 803 (1991).

Here, even assuming *arguendo,* that plaintiff's contribution of $100,000 to the Deposit, can be said to be a specifically identifiable fund, the claim nevertheless must fail. "A conversion claim cannot be based only on the allegation that a defendant received money and failed to remit payment to the plaintiff." Interstate Adjusters, Inc. v. First Fidelity Bank, N.A., 251 A.D.2d 232, 234 (1st Dept 1998). Here, as the conversion claim is based on allegations that defendants failed to pay plaintiff money owed to him from the arbitration award, it is insufficient to state a cause of action.

The third cause of action sufficiently states a cause of action for unjust enrichment. Unjust enrichment is a quasi-contract theory of recovery and "is an obligation imposed by equity to prevent injustice in the absence of an actual agreement between the parties concerned." Georgia Malone & Co., Inc. v. Reider, 86 A.D.3d 406, 408 (1st Dept 2011). To prevail on a claim of unjust enrichment, the plaintiff must establish that (1) the other party was enriched, (2) at the party's expense, and (3) that it is against good conscience and equity to permit the other party to keep what is sought to be recovered. Cruz v. McAneney, 31 A.D.3d 54, 59 (2d Dept 2006). Moreover, in order to plead unjust enrichment, it must be alleged that the relationship between the parties "could have caused reliance or inducement" by the plaintiff. Mandarin Trading Ltd v. Wildenstein, 16 N.Y.3d 173, 182 (2011).

Here, the allegations in the amended complaint are sufficient to state a cause of action for unjust enrichment. Contrary to defendants' argument, the amended complaint

adequately alleges that defendants were enriched by plaintiff's contribution since such contribution was utilized by defendants in an attempt to secure the purchase agreement for the Italian Team. Although the deal did not come to fruition, the money provided by plaintiff allegedly benefitted defendants, when TAG was awarded approximately 80% of the Deposit, which included plaintiff's contribution. While the court recognizes that to succeed on the unjust enrichment claim, plaintiff must show that each of the defendants was enriched by the money provided by plaintiff (Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472 (1st Dept 2010), at this early stage of the action, the allegations in the complaint are sufficient to satisfy this requirement.

Next, based on plaintiff's friendship with the individual defendants and their direct contact with plaintiff, the reliance element has been met. Georgia Malone & Co., Inc., 86 A.D.3d at 404. Finally, it cannot be said that the unjust enrichment claim is duplicative of the dismissed breach of contract claim. See generally, W. End Interiors, Ltd. v. Aim Constr. & Contr. Corp., 286 A.D.2d 250, 252 (1st Dept 2001).

The fourth cause of action states defendants breached the implied covenant of good faith and fair dealing by not repaying plaintiff for his contribution. "Implicit in all contracts is a covenant of good faith and fair dealing in the court of contract performance ... This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract ... Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." Lonner v. Simon Prop. Group, Inc., 57 A.D.3d 100, 108, 866 N.Y.D.2d 239, quoting, Dalton v. Educational Testing Serv., 87 N.Y.2d 384, 389. Furthermore the implied covenant of

good faith and fair dealing "is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." Atlas elevator Corp v. United Elevator Group, Inc., 77 AD3d 859 (2d Dept 2010).

However, New York courts do not recognize breach of the implied duty of good faith and fair dealing as a claim distinct from breach of contract. Under New York law, there is no separate cause of action for breach of implied duty of good faith and fair dealing because it "is merely a breach of the underlying contract." Commerce and Indus. Ins. Co. v. U.S. Bank Natl. Assn., 2008 WL 4178474, * 3 (SD.N.Y.2008)(citation omitted); see also TeeVee Toons, Inc. v. Prudential Sec. Credit Corp., L.L.C., 8 A.D.3d 134, 134 (1st Dept 2004)(affirming dismissal of claim of breach of the implied covenant of goo faith because it was redundant of breach of contract claim).

Here, plaintiff does not have a sufficient basis for claiming breach of the implied duty of good faith and fair dealing as such claim is intertwined with the dismissed breach of contract action. Accordingly, claim for breach of the implied duty of good faith and fair dealing must be dismissed.

Conclusion

In view of the above, it is

ORDERED that defendants' motion to dismiss the first amended complaint is granted to the extent of dismissing the first, second and fourth causes of action in their entirety; and it is further

ORDERED that defendants shall answer the remaining allegations in the amended complaint within 30 days of the date of this decision; and it is further

ORDERED that the parties shall appear for a preliminary conference that shall be held on May 23, 2014 in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: ~~February ___, 2014~~ March 12, 2014

HON. JOAN A. MADDEN
J.S.C.

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